IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 717 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ISMAILBHAI HAJI IBRAHIMBHAI MALEK

Versus

GORDHANBHIA HATHIBHAI PATEL SINCE DECD THROUGH HIS HEIRS

Appearance:

1. Civil Revision Application No. 717 of 1981

MR BR PARIKH for Petitioners No. 1-8

DELETED for Petitioner No. 1

MR NS DESAI for Respondent No. 1

MR MAHESH T PARIKH for Respondent No. 1

RULE SERVED for Respondents No. 1/1-1/5 but absent

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 20/12/2001

ORAL JUDGEMENT

#. Rasulbhai Abdulbhai Fala-original petitioner no.1 since deceased has filed this Civil Revision Application under section 29(2) of the Bombay Rent Act challenging the judgment and decree dated 23.10.1980 passed by the learned Jt. District Judge, Nadiad in Civil Appeal No.91 of 1979. The learned Jr. District Judge was pleased to dismiss the appeal and confirmed the judgment and decree of the Trial Court dated 28.3.1979 in Regular Civil Suit No. 16 of 1976 filed by Rasulbhai Abdulbhai.

#. The facts giving rise to the present Revision Application are as under:

2.1 The petitioners are the original plaintiffs-petitioners and respondents are the trustees of the trust known as "Allabax Kabarstan. The said trust is registered under the provisions of Bombay Public Trusts Act 1959. There is a property-which is portion of land situated at the Kabarstan. The land is situated at Nadiad admeasuring 200 ft north and 50 ft. east west. On the west of the suit land there is one Kans. On the west of the land there is one Kans, on the south of the land there is one road, on the east of the land there is Khabarastan land and on the north also there is Kabarastan land (Said land is referred to as the Suit property). It is the case of the plaintiff that the trustees of Allabax Kabarstan has given this open land on lease to Gordhanbhai Hathibhai Purohit-defendant no.1 in this case. (It may be stated here that in the original record the name of defendant no.1 is shown as Gordhanbhai Hathibhai Patel but his real name is Gordhanbhai Hathibhai Purohit). The defendant no.1 was given this land on a monthly rent of Rs.83.50 p. and a lease deed was executed on 23.6.1968 which has been produced on record at exh.26. As per the terms and conditions of the said document all taxes including the education cess were to be paid by the tenant. It has been stated in the said document that the land is not to be given to anybody i.e. the land is not to be sub let to anybody in this behalf. Only the tenant was entitled to use the suit land and the tenant was liable to pay rent in this behalf.

#. As the defendant no.1 failed and neglected to pay the rent the plaintiff no.1 was constrained to address a notice dated 29.8.75 (exh.27) demanding the arrears of rent in this behalf. In the said notice it has been stated that the defendant no.1 has failed and neglected to pay the rent from 23.6.1968. Defendant no.1 has constructed about 36 rooms on the suit land and said rooms have been given on lease to other people and thereby sublet the premises in this behalf. In view of

the same the defendant no.1 was in arrears from 6 months amount to Rs. 374/- and thereafter the tenancy was determined and accordingly terminated the tenancy of the defendant no.1. The plaintiff landlord directed that the tenant should hand over the site by 23.9.75 or on the completion of the period by which according to the defendant that his tenancy has come to an end. The defendant no.1-tenant replied to the said notice on 22.9.1975. By the said reply the defendant no.1 has denied the allegations raised by the plaintiff. He has also denied that he was a monthly tenant. He stated that he was an yearly tenant and he was paying the yearly rent of Rs.960.00 and thereafter the monthly rent has been increased to Rs.1000/- and he has already paid the rent upto 31.3.1975. He has stated that the land was taken on lease for construction of rooms on the said land and he has constructed the rooms accordingly and incurred lot of expenses in this behalf and he has not constructed the said rooms illegally. He has denied that he was a tenant in arrears from 31.3.1975 and he has raised the dispute of standard in this behalf. He has stated that the standard rent cannot be more than Rs.200/- per year. According to him the landlord is entitled to demand the rent only on 30.3.1976/ He has denied subletting the premisses to other persons.

#. Thereafter the plaintiff has filed the present suit being Reg.Civil Suit No.16 of 1976 somewhere on 8.7.1976. In the said suit also the plaintiff claimed vacant and peaceful possession of the suit premises in question on the grounds of arrears of rent and also on the ground that the land was given to him as open land and on that he has constructed rooms and thereby he has committed breach of the terms of tenancy and claimed Rs.751.50 as mesne profit upto 23.12.1975 and he has also claimed Rs.1008/- as damages in this behalf.

#. The defendant no.1 filed written statement at exh.13 and denied the contentions raised by the plaintiff. The defendant no.1 has reiterated what he has replied to the notice of the plaintiff.

#. Thereafter the parties have led oral and documentary evidence. On behalf of the plaintiff Rasulbhai is examined at exh.24 and defendant no.1 Gordhanbhai Hathibhai is examined at exh..32. The plaintiff has reiterated what is stated in the notice as well as in his deposition and claimed vacant and peaceful possession in this behalf.

#. Gordhanbhai Hathibhai in his deposition stated that

he has taken the land on lease for construction the rooms/godowns for storing his goods therein and also to keep some person to look after the said goods. He has also admitted in his cross examination that certain persons are also staying in the rooms also.

#. Issues have been raised by the Trial Court in this case at exh.14.

#. Thereafter the suit was contested and ultimately the learned Trial Judge by his judgment and decree dated 28.3.1979 was pleased to dismissed the suit. The learned Trial Judge has held that the suit which has been filed is maintainable at law. The learned Trial Judge has also held that said Trust is registered under the provisions of Bombay Public Trusts Act. It has also been held by the learned Trial Judge that the plaintiff-trust has given only open land to defendant no.1 as described in para 2 of the plaint. The learned Trial Judge further held that the plaintiff has proved that the defendant no.1 is a monthly tenant of the suit premises and the rent of the suit premises is Rs. 83.50 p.m. The learned Trial Judge further held that the plaintiff has proved that education cess and other taxes are to be paid by the defendant no.1. The learned Trial Judge has further held that the plaintiff is entitled to recover Rs. 334/- as arrears of rent upto 31.7.1975 and further mesne profit at the rate of Rs. 83.50 per month. However, the learned Trial Judge held that the plaintiff has failed to prove that the defendant no.1 has constructed rooms on the suit land without prior permission and has thereby committed breach of terms of tenancy . The learned Trial Judge further held that the plaintiff has failed to prove that the defendant no.1 has without any prior permission sublet any part of the suit land. The learned Trial Judge further held that the plaintiff has failed to prove that the defendant no.1 has encroached upon the suit land admeasuring about 50 ft. x 15 ft.. The learned Trial Judge has also held that the notice is legal and valid and therefore, the plaintiff is not entitled to any possession in this behalf.

##. Being aggrieved by the aforesaid judgment and decree passed by the learned Trial Judger the plaintiff filed Regular Civil Appeal No.91 of 1979 before the learned District Judge, Kheda at Nadiad somewhere on on 18.6.1979.

##. The Appeal was thereafter heard by the learned Jt. District Judger, Kheda at Nadiad and the learned Jr.

District Judge by his judgment and decree dated 23.10.1980 was pleased to dismissed the said appeal. According to the learned Appellate Judge the plaintiff has failed to prove that the defendant no.1 has constructed rooms on the suit land without prior permission and has thereby committed breach of the terms and conditions of the tenancy. According to the learned Appellate Judge the plaintiff has also failed to prove that defendant no.1 has without any prior permission sub let any portion of the suit land. The learned Appellate Judge has also held that the plaintiff has failed to prove that the defendant no.1 has made encroachment on the land admeasuring about 50 ft. north south and 15 ft.. east west.

##. Being aggrieved by the said judgment and decree of the learned Appellate Judge original plaintiff-landlord has filed this Revision Application before this Court somewhere on 13.1.1981. In this matter Rule was issued in the month of May 1981.

##. Thereafter the matter was adjourned from time to time. During the pendency of the proceedings the petitioner has brought all the trustees of the Trust on record by way of amendment and since Gordhanbhai Hathibhai has died , his heirs also brought on record by way of amendment in this behalf. The Rule was sent to them. However, nobody appears on their behalf.

##. Mr. B.R.Parikh learned advocate for the petitioner submitted that in this case the original leased deed has been executed between the plaintiff-trust and defendant no.1 dated 23.6,68 (exh.23) by which the plaintiff-trust has leased out only open land to the defendant. The said lease specifically prohibits the premises/land to be used by any other persons or sub let in this behalf. He has stated that aforesaid lease deed will have to be read in this behalf. He submitted that it is an admitted fact that in this case the defendant no.1 has constructed room and given those rooms on lease to some other persons. The said rooms are permanent structures in this behalf. He submitted that section 13 of the Bombay Rent Act will have to be considered. Mr. Parikh learned advocate for the petitioners has relied upon section 13(1)(b) of the Bombay Rent Act, which reads as under:

"13. When landlord may recover possession
(1) Notwithstanding anything contained in this
Act but subject to the provisions of sections 15

and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

(a) that the tenant has committed any act contrary to the provisions of clause (o) of section 108 of the Transfer of Property Act, 1882 or

(b) that the tenant has without the landlord's consent given in writing, erected on the premises any permanent structure

[Explanation. For the purposes of this clause, the expression "permanent structure" does not include the carrying out of any work with the permission wherever necessary, of the local authority, for providing a wooden partition, standing cooking platform in kitchen, door, lattice work or opening of a window necessary for ventilation, a false ceiling, installation of air conditioner, an exhaust outlet or a smoke chimney; or]

(e) that the tenant has, since coming into operation of this act, unlawfully sub-let the whole or part of the premisesi or assigned or transferred in any other manner his interest therein;or

##. Mr. Parikh the learned advocate for the petitioners submitted that admittedly in this case without obtaining written consent of the plaintiff, the defendant no.1 has erected permanent structures/rooms on the suit land and therefore given those rooms on lease to certain other persons. Therefore, the act of defendant no.1 of constructing rooms and thereafter giving the same on lease to other persons is violative of section 13(1)(b) of the Bombay Tenancy Act read with the lease deed in this behalf.

##. The learned advocate for the petitioners further submitted that a conjoint reading of section 13(1)(b) of the Bombay Rent Act and the lease deed clearly shows that the plaintiff is entitled to evict the defendant no.1-tenant as defendant no.1 has erected permanent structures on the land leased out to him. without permission of the plaintiff Trust given in writing. Mr. Parikh submitted that in this case the lease deed prohibits any construction and sublet premises. However, it can be done provided there is a consent of landlord in making any erection or construction, it must be in writing. There is a defence of the defendant no.1 that

he has erected the disputed structure with the consent of the landlord. To avoid such flimsy defences, the Legislature in its wisdom provided that the consent of the landlord must be in writing. Oral consent is not enough. He therefore, submitted that admittedly there is no written consent of the landlord for creating permanent structure and therefore, there is violation of section 13(1)(b) of the Bombay Rent Act. He submitted that after the construction of permanent structure, when the tenant has given on lease the said structures/rooms on lease to other persons. He therefore, submitted that when the property was an open piece of land when it was given to the defendant no.1-tenant on lease. The permanent structures were constructed by the defendant no.1 on the land which does not belong to defendant no.1 and the same were leased out to other persons by the defendant no.1 and thereby he has created a lease under the Transfer of Property Act in this behalf. He submitted that there is no dispute before the Trial Court as well as the lower Appellate Court that the structures erected by the defendant no.1-tenant are permanent structures. He further submitted that however the test regarding permanent structure is as to what kind of material the structures are erected and the degree of erection to the earth in this case. In this case it is proved that the rooms are erected by the defendant no.1 and therefore, in any view of the matter the structures are permanent structures.

##. It may be noted that the Appellate Court has relied upon the judgment of this Court (Coram: J.B.Mehta-J as he was then) in Civil Revision Application No.989 of 1962 decided on 16.11.1966. Mr. Parikh learned advocate for the the petitioner, after going through the original judgment from the file of the learned Judge contended that in that case the plaintiff-trustees filed a suit in that capacity against the defendants for recovery of possession of the suit land. It was the case of the petitioners that the defendants had taken on lease the suit property belonging to the temple from the present trustees for a period of about 11 years under the registered lease deed. In that case the petitioners' case was that the suit premises had been unlawfully sublet to more than six persons by the defendants. It was further the case of the petitioners that the defendants had no right to sublet the same and that the rent realised by these defendants from the sub-tenants was in excess of the standard rent. Possession was also sought on certain other grounds which are not material for this petition. The defendants denied that there was any sub lease entered into by them and they also denied

that the plaintiffs were entitled to get possession from them on the other grounds mentioned by the plaintiffs. The Trial Court held that there was no sub letting at all as the lease was only of the land and not of the superstructure which belonged to the defendants. The other grounds were also negatived and the plaintiffs' suit was dismissed by the trial Court. The appellate Court even though it came to the conclusion that there were four persons who paid rent of Rs.3/- per month of the four rooms, the letting out of those four rooms to the said four persons did not amount to sub-letting.

##. The appellate Court also held that as no subletting of the portion of the suit premises was proved, the other ground that the rent charged for those premises let out by the defendants was in excess of the standard rent and the permitted increases did not arise in respect of those rooms. The appellate court also held that there was also nothing on record to show as to what rent was being recovered in respect of the superstructure and what rent was being charged in respect of the land. The appellate Court therefore, decided both the issues in the negative and dismissed the plaintiffs' appeal Thereafter the plaintiffs have filed necessary Revision Application in this behalf. Mr. Parikh has submitted that in that case the premises was open land and the same was given on lease to the tenant. The land was given on rent. However, clause 4 of the said lease deed provided that the lessee was entitled to put up construction or to make any use of of the land let as he deemed fit. Clause provided that the superstructure built would be removed by the lessee on the expiry of the lease and therefore, it was clear that the said lease was only in respect of the open land and it only enabled the lessee to put up superstructure at his cost, which he specifically agreed to remove on the expiry of the lease. In view of the peculiar facts and circumstances of the case the learned Judge held that clause 4 provides that the the tenant could construct super structure or make such use as they deemed fit and in para 5 it is provided that on the expiry of the lease the tenants would remove all the structures which were already erected and which would be erected after the said subsequent lease. In view of these terms, according to him, there is no doubt that what was let was only the open land and not the superstructure. The superstructure was constructed by the deceased tenant and the said superstructure was not let to the defendants tenants even at the time of the subsequent lease. In view of these facts the learned Judge has held that there is no sub-tenancy created on the person to whom the superstructure has been let out.

##. Mr. Parikh further submitted that in that case there was no question of section 13(1)(b) of the Bombay Rent Act. In that case the the court was concerned with sections 13(1)(e) and 13(1)(j). In view of the same, the said decision is not applicable to the facts of the present case. He further stated that the landlord has ably proved the case under sections 13(1(b) and 13(1)(e) in this behalf. In this case the lease deed provided that the tenant should not give sub-lease in this behalf and therefore, also the condition in section 13(1(e) can be proved in this behalf.

##. In view of the same he stated that in this case the reasonings of both the Trial Court and the Appellate Court are that the defendant no.1 has erected structures as per the knowledge of the plaintiff and the plaintiff was aware about the same and he did not take any steps immediately and therefore, the plaintiff is estopped from taking any steps in the behalf are irrelevant if one considers the statutory language of section 13(1)(b) of the Bombay Rent Act in this behalf.

##. According to the learned advocate Mr. B.R.Parikh both the Trial Court and Appellate Court has not properly considered the terms of lease deed as swell as section 13(1)(b) as well as sec.13(1)(e) of the Bombay Rent Act and therefore, the reasonings of both the Trial Court and Appellate Court are not legal and valid and therefore, the judgments of both the Trial Court and Appellate Court are required to be quashed and set aside and this Revision Application is required to be allowed.

##. In my view the contention raised by the learned advocate Mr.Parikh for the petitioner is well founded and both the Trial Court as well as the Appellate Court have not considered the terms and conditions of the lease deed as well as section 13(1)(b) and section 13(1)(e) of the Bombay Rent Act and it is an admitted fact that no written consent has been taken from the landlord by the defendant no.1 and permanent structures have been erected . Not only that the defendant no.1 has given those rooms to other people on lease to other persons. These facts cannot be disputed.

##. In view of the same the contentions of the learned advocate for the plaintiff petitioner is required to be accepted. The judgment and decree passed by both the courts below are hereby quashed and set aside. In view of this the defendant no.1 tenant will hand over vacant and peaceful possession of the property in question to

the plaintiff after removing the superstructure on or before 28.2.2002. If the defendant no.1 will not remove the superstructure the plaintiff will be at liberty to remove the superstructure in this behalf. This Revision Application is allowed with costs through out. Rule is made absolute.

(K.M.Mehta.J)

govindan